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No. 96-1579

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAMES BROGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether there is an exception to criminal liability under 18 U.S.C. 1001 for a false statement that consists of an "exculpatory no."

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 96 F.3d 35.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1996. Petitions for rehearing were denied on November 15, 1996. Pet. App. 16-17. The petition for a writ of certiorari was filed on February 13, 1997, and granted on June 9, 1997 (117 S. Ct. 2430). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. As in effect at the time of petitioner's false statement, 18 U.S.C. 1001 (1988) provided:

§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

2. As amended by the False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459, 18 U.S.C. 1001 now provides:

§ 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of unlawfully receiving

money from an employer, in violation of 29 U.S.C. 186(a)(2), (b)(1), and (d)(2), and of making a false statement to federal investigators, in violation of 18 U.S.C. 1001 (1988). He was sentenced to nine months' imprisonment, to be followed by two years of supervised release, and fined $4,000. The court of appeals affirmed. Pet. App. 1-13.

1. Petitioner was an officer of a union local. Pet. App. 2. On various occasions he accepted cash payments from JRD Management Corporation (JRD), a real estate management concern that employed members of his union. See Gov't C.A. Br. 9-17; Pet. App. 3-4. In October 1993, investigative agents from the Department of Labor and the Internal Revenue Service visited petitioner's home. Pet. App. 3; J.A. 1; Trial Tr. 520-521. After identifying themselves and informing petitioner that they were investigating JRD and various individuals, the agents informed petitioner that if he wished to cooperate with the investigation he should have an attorney contact the U.S. Attorney's Office. Pet. App. 3; J.A. 1-2. Petitioner then agreed to answer the agents' questions. Among other things, the agents asked petitioner whether he had received any cash or gifts from JRD, to which he responded "No." J.A. 2. The agents then told petitioner that they had seized JRD records indicating that he had received cash from the company, and they warned him that lying to federal agents in the course of an investigation was a crime. *Ibid.* The interview ended shortly thereafter, and petitioner did not modify his answers. Pet. App. 3-4; J.A. 2-3.

Petitioner was tried with several co-defendants. The jury found petitioner guilty of accepting unlawful

cash payments and of making a false statement to government investigators. See Pet. App. 2.

2. The court of appeals affirmed. Pet. App. 1-13. In its published opinion, the court rejected petitioner's attempt to rely on the "exculpatory no" exception that some courts have recognized as a defense to criminal liability under 18 U.S.C. 1001.[1]

At the time petitioner made his false statement to government investigators, Section 1001 generally prohibited, among other things, the making of "any false, fictitious or fraudulent statements or representations" in "any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. 1001 (1988).[2] As the court of appeals explained (Pet. App. 5-6, 11-12), however, several courts have adopted some version of an "exculpatory no" exception to liability under Section 1001, holding generally that the law does not reach "false statements that are essentially exculpatory denials of criminal activity" (*id.* at 5). Although the court observed that the judicial exception "appears to have been fashioned from whole cloth[,] with the result that even among circuits that have adopted it, there is a considerable divergence concerning its content" (*id.* at 11), it agreed with petitioner that his statement to federal investigators in this case was a "true 'exculpatory no[]' as recognized in other circuits" (*id.* at 6). The

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[1] The court of appeals also issued an unpublished opinion (96-7999 Pet. App. A7-A10) rejecting various other arguments, none of which is at issue before this Court.

[2] In 1996, in response to this Court's decision in *Hubbard* v. *United States*, 514 U.S. 695 (1995), Congress amended Section 1001 to clarify its language and extend its scope. False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459. The amended text is set out at pages 2-3, *supra*.

court declined, however, to recognize any version of the "exculpatory no" exception. *Ibid.*

The court found "no support" for such an exception in the language of Section 1001. Pet. App. 6-8, 11. Rejecting the argument that a defendant who "merely answers an inquiry in the negative" (*id.* at 6-7) has not made a "statement" within the meaning of that Section, the court reasoned that "[a] denial most certainly intends to convey information, * * * and is regarded by no one conversant with the English language as non-assertive" (*id.* at 7). Thus, the court held, "an exculpatory utterance, whether 'no' or something more elaborate, is a 'statement' within the purview of the statute." *Id.* at 8.

Similarly, the court's review (Pet. App. 8-10) of the history of Section 1001's enactment and amendment over the years disclosed no support for the conclusion reached by other courts that the law's "broad language generally prohibiting false statements of any sort cannot be taken at face value" (*id.* at 10). Although it recognized that some courts had sought to limit prosecution to false statements that would tend to "pervert the legitimate functions of Government" (*ibid.* (quoting *Paternostro* v. *United States*, 311 F.2d 298, 305 (5th Cir. 1962)), the court rejected that approach as based on "little more than a preference for a narrower over [a] broader statute," a choice that lies "solely within Congress's province" (Pet. App. 10). Finally, the court found no basis for believing that a plain-language interpretation of Section 1001 would infringe any right protected by the Fifth Amendment's privilege against compelled self-incrimination, because "the Fifth Amendment has no application to circumstances in which a person lies instead of remaining silent." *Id.* at 11.

The court of appeals noted that Section 1001 "embodies a willfulness requirement." Pet. App. 12. The court did not decide whether the government must show that a defendant knew that the law prohibits false statements. It cautioned, however, that its rejection of the "exculpatory no" doctrine was not "intended to suggest that the mere denial of criminal responsibility would be sufficient to prove such an element." *Id.* at 13. The court also did not "exclude the possibility that a trier of fact might acquit on the ground that a denial of guilt in circumstances indicating surprise or other lack of reflection was not the product of the requisite criminal intent." *Ibid.* In this case, however, the court noted that "the agents testified that they informed [petitioner] that such false statements were illegal and that [petitioner] answered the questions in circumstances suggesting deliberation." *Ibid.* The court therefore affirmed petitioner's conviction. *Ibid.*

SUMMARY OF ARGUMENT

Petitioner's false statement to federal agents investigating violations of federal law falls squarely within 18 U.S.C. 1001's prohibition of "any" knowing and willful "false, fictitious or fraudulent statements or representations" made "in any matter within the jurisdiction of any department or agency of the United States." Although the text admits of no exception, several courts of appeals have created and applied an "exculpatory no" exception to liability under Section 1001. This Court should reject that approach. A brief review of the lower-court cases demonstrates that the development and application of the exception has been far from uncontroversial, consistent, or stable over time. Those cases there-

fore provide no model for this Court to use in fashioning any extra-textual bar to prosecution. Indeed, the uncertain parameters of the exception developed by lower courts underscore the wisdom of adhering to the unqualified text of Section 1001. Cf. *Hubbard* v. *United States*, 514 U.S. 695 (1995).

The "exculpatory no" exception cannot be justified on policy grounds. The primary argument advanced for the exception is that a false denial of culpable conduct should not be punishable under Section 1001 because such a denial would not tend to "pervert the authorized function" of a governmental agency. There is no reason to assume, however, that such denials, as a category, will not tend to impede government investigators in their efforts to identify and stop wrongdoing; and there is no basis for inventing an "exculpatory no" defense to supplement the statute's textual requirement that any statement subject to prosecution be materially false. Nor is there logic to the distinctions drawn in the "exculpatory no" doctrine between false statements made in response to government inquiries and those made in communications initiated by the speaker, or between false denials and false assertions. Finally, it is difficult to accept the argument of petitioner's amicus that the opportunity to make false exculpatory denials of guilt will encourage frank communication with authorities. In any event, that argument, like the argument that Section 1001 in its present form is subject to prosecutorial "overreaching," cannot justify varying the plain language chosen by Congress in enacting Section 1001, and must be addressed to prosecutorial or legislative authorities, rather than to this Court.

Because the language of Section 1001 is clear, there is no need to examine its history to resolve this case. To the extent that it is relevant, however, that history indicates that when Congress has intended to restrict the prohibition now found in Section 1001 to certain types of falsehoods, it has expressly stated the relevant limitations. Nothing in the history of the present statute suggests any congressional intention to exclude from its scope any material false statement made to federal investigators. Petitioner's arguments based on legislative silence and ratification are particularly unpersuasive, in light of Section 1001's unqualified text and the unsettled nature of the law that petitioner claims Congress "ratified" when it amended the statute in 1996, after the Fifth Circuit had already repudiated its earlier adoption of the "exculpatory no" doctrine.

Finally, nothing in the Fifth Amendment either requires or justifies the imposition of judicial limitations on the scope of Section 1001. This Court has repeatedly rejected the argument that the Fifth Amendment ever confers a privilege to speak falsely, rather than simply to remain silent. A suspect questioned about a crime may either tell the truth or decline to answer, but in no event does he have a constitutionally protected right to lie. The option to remain silent is not "illusory" simply because a suspect may not be aware of it, or because remaining silent may have adverse consequences in investigative or judicial proceedings. Those factors can never justify lies. Because Section 1001 punishes only false statements, it offends no principle embodied in the Fifth Amendment.

ARGUMENT

PETITIONER'S FALSE STATEMENT TO FEDERAL INVESTIGATORS VIOLATED 18 U.S.C. 1001

A. The Plain Language Of Section 1001 Applies To Petitioner's False Statement

Section 1001 of Title 18 imposes criminal liability on any person who "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully * * * makes any false, fictitious or fraudulent statements or representations." 18 U.S.C. 1001 (1988).[3] Government agents identified themselves to petitioner, informed him that they wished to speak with him as part of an ongoing government investigation, and asked him whether he had ever received money or gifts from an employer that did business with his union. Petitioner responded that he had not, when in fact he had. His answer thus falls squarely within the statute's

[3] As recently amended (see note 2, *supra*), Section 1001 applies generally to anyone who "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully * * * makes any materially false, fictitious, or fraudulent statement or representation." The amended provision includes exceptions for certain matters within the jurisdiction of the Judicial and Legislative Branches. There is no exception for any matter within the jurisdiction of the Executive Branch, such as the investigation during which petitioner was questioned. See *United States* v. *Rodgers*, 466 U.S. 475 (1984) (conduct of a legally authorized investigation is a matter "within the jurisdiction" of the investigating agency).

prohibition.[4] Indeed, petitioner concedes that his statement was criminally false under a "literal" interpretation of Section 1001. Pet. Br. 5-6, 18-20.

Petitioner nonetheless contends that this Court should recognize an exception to liability under Section 1001 for any false statement that may be characterized as an "exculpatory no." While that argument finds support in some cases from the courts of appeals, it finds none in the language of the statute. To the contrary, Section 1001 extends to "any" false statement or representation. See *United States* v. *Gonzales*, 117 S. Ct. 1032, 1035 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"). As the court of appeals held, a denial of culpable conduct, even if it consists only of the word "no," "most certainly intends to convey information," and is therefore a "statement" or "representation" within the normal meaning of those words. Pet. App. 7; see also *Webster's Third New International Dictionary* 2229 (1986) (defining "statement" to include "a single declaration or remark," "assertion"); *id.* at 1926 (defining "representation" to include "a statement or account esp. made to convey a particular view or impression of something with the intention of influencing opinion or action"); *United States* v. *Rodriguez-Rios*, 14 F.3d 1040, 1044 (5th Cir. 1994) (en banc); *United States* v. *LeMaster*, 54 F.3d 1224, 1230 (6th Cir. 1995), cert. denied, 116 S. Ct. 701 (1996); cf. *United States* v. *Woodward*, 469 U.S. 105 (1985) (rejecting double jeopardy challenge to con-

[4] Petitioner has not contested that his false statement was made "knowingly and willfully" within the meaning of Section 1001.

viction under Section 1001 for falsely checking "no" on currency disclosure form).

As this Court concluded in *Hubbard* v. *United States*, 514 U.S. 695 (1995), courts are not at liberty to invent exceptions to Section 1001 that have no foundation in the text of that provision. *Id.* at 713 (plurality opinion) ("We think the text of § 1001 forecloses any argument that we should simply ratify the body of cases adopting the judicial function exception."); *id.* at 717 (concurring opinion) (rejecting "the Courts of Appeals' invention of a 'judicial function' exception" because "there is simply no basis in the text of the statute for that"). Nor is there any sound policy, historical, or constitutional reason for this Court to adopt any exception to liability under Section 1001 that is at variance with the text as written and enacted by Congress.[5]

B. The "Exculpatory No" Exception Created By Some Courts Of Appeals Is Neither Widely Accepted Nor Consistently Applied

As petitioner points out (Br. 7 & n.2), a number of lower-court cases have created and applied an "exculpatory no" exception to liability under Section 1001.

[5] Courts that have recognized an "exculpatory no" exception (see pages 12-19, *infra*) have candidly admitted that it has no explicit textual basis. See, *e.g.*, *United States* v. *Taylor*, 907 F.2d 801, 803 (8th Cir. 1990) ("It is evident, as the government contends, that the plain language of the statute does not contain an 'exculpatory no' exception."); *United States* v. *Beer*, 518 F.2d 168, 171 (5th Cir. 1975) ("The judiciary has also found it necessary to narrow the parameters of the statute through the 'exculpatory no' doctrine."); *United States* v. *Bedore*, 455 F.2d 1109, 1110 (9th Cir. 1972) ("Extension of section 1001 to its literal breadth, however, cannot be justified by its legislative history.").

Petitioner (see Br. 7-8) and his amicus the National Association of Criminal Defense Lawyers (NACDL) (see Br. 12-13) briefly cite several such cases and imply that the courts of appeals have, over time, evolved a narrow, stable, and coherent doctrine that merits this Court's endorsement. A slightly more detailed review of the cases demonstrates, however, that no consistent and principled version of the "exculpatory no" exception exists in the lower courts, and it is doubtful that one could readily be formulated.

The "exculpatory no" exception was first adopted at the appellate level in *Paternostro* v. *United States*, 311 F.2d 298, 300-305 (1962), in which the Fifth Circuit distinguished (*id.* at 305) between defendants who "aggressively and deliberately initiate any positive or affirmative statement calculated to pervert the legitimate functions of Government" and one who made "mere negative responses to questions propounded to him by an investigating agent during a question and answer conference, not initiated by the [defendant]." On the basis of its "review of the legislative history of the statute and the purposes it seeks to accomplish," the court refused to allow prosecution of a defendant in the latter category. *Ibid.* The Fifth Circuit applied the "exculpatory no" doctrine in a number of cases that arose during the ensuing 30 years.[6] In *United States* v.

[6] See *United States* v. *Abrahams*, 604 F.2d 386 (1979) (statements concerning identity and criminal record made to magistrate at bail hearing); *United States* v. *Schnaiderman*, 568 F.2d 1208 (1978) (denial to customs officers concerning possession of currency); *United States* v. *Bush*, 503 F.2d 813 (1974) (statements to internal revenue agents); see also, *e.g.*, *United States* v. *Lambert*, 501 F.2d 943, 946 (1974) (en banc)

Rodriguez-Rios, 14 F.3d 1040 (1994), however, the court reconsidered the matter en banc and overruled *Paternostro*, concluding (*id.* at 1045) that the application of Section 1001 "should be determined by the text and not by a judicial reconstruction of its purpose."

Outside the Fifth Circuit and the Eleventh Circuit (which inherited the doctrine from the Fifth, see, *e.g.*, *United States* v. *Palzer*, 745 F.2d 1350, 1354 & n.8 (11th Cir. 1984)), the "exculpatory no" doctrine has been most frequently applied in the Ninth Circuit. In *United States* v. *Bedore*, 455 F.2d 1109, 1110 (1972), that court barred prosecution of an individual who gave a false name to a federal agent who was endeavoring to serve a subpoena. In subsequent cases, it elaborated a five-part test for application of the doctrine:

> (1) the false statement must be unrelated to a claim to a privilege or a claim against the government;
>
> (2) the declarant must be responding to inquiries initiated by a federal agency or department;
>
> (3) the false statement must not impair the basic functions entrusted by law to the agency;
>
> (4) the government's inquiries must not constitute a routine exercise of administrative responsibility; and

(reaffirming doctrine in dictum); *United States* v. *Johnson*, 530 F.2d 52, 55 (exception not applicable where defendant voluntarily submitted false affidavit), cert. denied, 429 U.S. 833 (1976); *United States* v. *Krause*, 507 F.2d 113, 116-118 (1975) (exception not applicable to particular false testimony before administrative hearing examiner).

> (5) a truthful answer would have incriminated the declarant.

United States v. *Equihua-Juarez*, 851 F.2d 1222, 1224 (1988). Applying these criteria, the Ninth Circuit has, for example, permitted prosecution of a defendant who lied to a customs agent about where he had travelled, *United States* v. *Rose*, 570 F.2d 1358, 1364 (1978) (defendant "was claiming the privilege of entry [into the United States], and his statement potentially impaired the function of the Customs Service"), but precluded prosecution of a defendant who told false stories to Drug Enforcement Administration agents after being caught driving a truck carrying marijuana across the California border, *United States* v. *Medina de Perez*, 799 F.2d 540, 546 (1986) ("[A] competent government investigator will anticipate that the defendant will make exculpatory statements. A defendant who meets this expectation cannot possibly pervert the investigator's police function."). See also *United States* v. *Alzate-Restreppo*, 890 F.2d 1061, 1068-1069 (9th Cir. 1989) (opinion of Patel & Nelson, JJ.) (collecting cases).[7]

[7] In *United States* v. *Myers*, 878 F.2d 1142, 1143 (9th Cir. 1989), a private pilot "concocted" a story about losing his contact lenses during flight to explain why he had flown into prohibited airspace over President Reagan's California ranch. The court upheld the pilot's conviction for telling that story to agents of the Federal Aviation Administration, on the ground that that inquiry was purely administrative, but reversed his conviction for telling the same story to agents of the Secret Service. *Id.* at 1144. As in *Medina de Perez*, the court explained that "a good investigator will expect the accused to lie," and it was "unable to find that the appellant's falsehoods impaired or otherwise perverted the Secret Service's investigative function." *Ibid.*

The Ninth Circuit has explicitly rejected, at least in the context of post-arrest interrogation, the argument that there is "any meaningful distinction between an exculpatory 'no, I am not guilty,' and a more complete, evasive exculpatory response to a direct question." *Medina de Perez*, 799 F.2d at 546 n.9. Petitioner emphasizes that his statement to investigators in this case involved "the mere utterance of the word 'no'" (Br. 8) and that he "did not elaborate upon that response in any way" (Br. 4). For its part, amicus the NACDL disclaims support for an exception in any case in which the speaker "elaborate[s] upon a simple exculpatory denial by affirmatively misdescribing facts" (NACDL Br. 4). The court that has actually applied the "exculpatory no" doctrine most frequently, however, has "fail[ed] to see" the basis for any such distinction. 799 F.2d at 546 n.9.

Outside the Fifth, Ninth, and Eleventh Circuits, support for any version of a judicial "exculpatory no" exception is limited. The First Circuit's decision in *United States* v. *Chevoor*, 526 F.2d 178, 182-185 (1975), cert. denied, 425 U.S. 935 (1976), for example, is routinely cited as adopting the doctrine (*e.g.*, Pet. Br. 7 n.2; NACDL Br. 12), although *Chevoor* itself did not involve a prosecution under Section 1001. In its only other treatment of the doctrine, however, that court, sitting en banc, vacated a panel decision that had been based solely and "reluctantly" on *Chevoor*. *United States* v. *Poutre*, 646 F.2d 685, 686 (1980). Acknowledging that "[t]he judicial engrafting of an 'exculpatory no' exception on a facially all-inclusive statute" involved "the arbitrariness of a court-drawn line between affirmative and exculpatory negative responses," and expressing the hope that the provision would soon receive "legislative therapy," the court

pronounced itself "not eager to consider further development of the 'exculpatory no' doctrine." *Ibid.* The court therefore decided the case before it on a different ground. *Ibid.*

Similarly, the Seventh Circuit is regularly cited as being among those courts that have "embraced" the "exculpatory no" exception. See Pet. Br. 7 n.2; NACDL Br. 12-13. That court, however, has mentioned the doctrine only four times in the context of Section 1001, and has never applied it to bar a prosecution under that Section.[8] Most recently, in *Moser* v. *United States*, 18 F.3d 469, 473-474 (1994), the court described the exception as "largely a judge made creation in the federal judiciary below the Supreme Court," characterized its prior cases as having taken a "passing glance" at the doctrine and "provided a very small window of opportunity for [its]

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[8] In *United States* v. *Isaacs*, 493 F.2d 1124, 1158 (7th Cir.), cert. denied, 417 U.S. 976 (1974), the court held that the Fifth Circuit's decision in *Paternostro* had "no application" to "positive and affirmative" false statements to Internal Revenue Service investigators that went beyond a simple denial. *United States* v. *King*, 613 F.2d 670, 674-675 (7th Cir. 1980), likewise found the doctrine as articulated (at that time) by the Fifth Circuit inapplicable to the facts of a particular case. *King* characterized the doctrine as "a very limited exception to section 1001," restricted to "simple negative answers" given "under circumstances indicating that the defendant is unaware that he is under investigation" (*id.* at 674)—a qualification that would presumably make the doctrine inapplicable to petitioner. See J.A. 1-2 (agents informed petitioner that they wished to question him in connection with an ongoing investigation). *United States* v. *Picketts*, 655 F.2d 837, 842 n.3 (7th Cir.), cert. denied, 454 U.S. 1056 (1981), rejected an "exculpatory no" argument without discussion.

application * * * in this circuit," and again held it inapplicable on the facts before the court.

The Fourth Circuit adopted the "exculpatory no" doctrine, over a dissent, in *United States* v. *Cogdell*, 844 F.2d 179, 182-185 (1988), recognizing that it had been developed by courts "as an exception to the broad provisions of the statute" (*id.* at 182), but describing it as a "narrow yet salut[a]ry limitation on a criminal statute" (*id.* at 183). *Cogdell* also adopted the Ninth Circuit's five-part test for application of the exception. *Ibid.* In *United States* v. *Moore*, 27 F.3d 969, 978-980, cert. denied, 513 U.S. 979 (1994), however, the court, concerned by "the thin textual and constitutional foundations" of the doctrine, limited *Cogdell* to its facts, explicitly rejecting the Ninth Circuit's expansion of the doctrine to cover "even elaborate exculpatory tales" (*id.* at 979).[9]

The Eighth Circuit did not have occasion to pass on the matter until 1990, but it then joined the other circuits that had recognized some form of the doctrine, although it found it "evident * * * that the plain language of the statute" contained no such exception. *United States* v. *Taylor*, 907 F.2d 801, 803 (1990). The Tenth Circuit discussed the Fifth Circuit's case law (as it then stood) at some length in

[9] For another example of conflict in defining the contours of the doctrine, compare *Cogdell*, 844 F.2d at 184 ("The fourth requirement—that the statement be uttered in response to investigative inquiries rather than inquiries that represent routine exercises of administrative authority—touches the core of the reason for the 'exculpatory no' exception."), with *United States* v. *Payne*, 750 F.2d 844, 863 n.21 (11th Cir. 1985) ("We reject the distinction, relied upon in some 'exculpatory no' cases * * *, between 'investigative' and 'administrative' governmental inquiries" as "unhelpful").

United States v. *Fitzgibbon*, 619 F.2d 874, 876-881 (1980), although it concluded that the facts of that case "d[id] not 'fit the mold' of the 'exculpatory no' exception applied by the Fifth Circuit" (*id.* at 880), and it has neither applied nor discussed the doctrine since. The Third, Sixth, and District of Columbia Circuits have all explicitly noted that they have neither adopted nor rejected the doctrine, although the Sixth Circuit has discussed the issue at length and indicated that any application in that Circuit would be narrow. See *United States* v. *LeMaster*, 54 F.3d 1224, 1229 (1995), cert. denied, 116 S. Ct. 701 (1996) (discussing *United States* v. *Steele*, 933 F.2d 1313 (6th Cir.) (en banc), cert. denied, 502 U.S. 909 (1991)); *United States* v. *Barr*, 963 F.2d 641, 645-647 (3d Cir.) (noting that the doctrine is a "judicially created exemption from prosecution"), cert. denied, 506 U.S. 1033 (1992); *United States* v. *White*, 887 F.2d 267, 273-274 (D.C. Cir. 1989) (R.B. Ginsburg, J.). And in this case, of course, the Second Circuit joined the Fifth in rejecting the doctrine entirely.[10]

As this summary makes clear, the development and application of the "exculpatory no" doctrine in the

[10] The United States Court of Appeals for the Armed Forces has refused to adopt an "exculpatory no" exception to 10 U.S.C. 907, the military analogue to 18 U.S.C. 1001. *United States* v. *Solis*, 46 M.J. 31 (1997). The Federal Circuit, on the other hand, has recently fashioned a similar doctrine for use in certain federal employee discipline cases, holding that "an agency may not charge an employee with falsification or a similar charge on the ground of the employee's denial of another charge or of underlying facts relating to that other charge." *King* v. *Erickson*, 89 F.3d 1575, 1585 (1996). This Court granted certiorari to review the Federal Circuit's decision in *Erickson*, see 117 S. Ct. 2506 (1997), and the case is presently pending (No. 96-1395).

courts of appeals has been far from uncontroversial, consistent, or stable over time. That precedent therefore furnishes no clear guidance for this Court on the foundation or scope of any such exception. Nor, as we discuss below, are there sound policy reasons to support a "judicially created exemption from prosecution" under Section 1001. *Barr*, 963 F.2d at 645.

C. Policy Arguments Do Not Support Judicial Creation Of An "Exculpatory No" Exception

Petitioner argues (Br. 8-11) that his "simple denial of guilt" should not be treated as a "statement" within the meaning of Section 1001 because it "could not, and did not, pervert the authorized function of any governmental department or agency." That argument is unpersuasive. It rests on the remarkable—and false—premise that federal investigators should expect the people they interview to lie, and that false denials of wrongdoing therefore do not impede the discharge of investigative duties. See, *e.g.*, Pet. Br. 9-10; *United States* v. *Myers*, 878 F.2d 1142, 1144 (9th Cir. 1989) ("a good investigator will expect the accused to lie") (discussed at note 7, *supra*); *Cogdell*, 844 F.2d at 184; see also *Alzate-Restreppo*, 890 F.2d at 1068 (opinion of Patel & Nelson, JJ.) (describing this line of analysis as "disturbing"). Yet a false denial can only be intended to influence the investigator's understanding of the facts, to persuade him (falsely) of the speaker's innocence, and to divert attention elsewhere. While such a denial may have little chance of success in some cases, in others it may significantly impede the search for truth. See also *United States* v. *Capo*, 791 F.2d 1054, 1069 (1986) ("The statute contains no requirement that the defendants' misrepresentation be successful, and we

decline to read one into it."), vacated in part on other grounds, 817 F.2d 947 (2d Cir. 1987) (en banc). Any argument that a particular false statement lacked any potential to affect the functioning of the investigating agency is properly addressed, instead, as a challenge to the materiality of the false statement. See *United States* v. *Gaudin*, 515 U.S. 506, 509 (1985) (materiality requires a showing to the jury that the statement had the natural tendency to influence, or was capable of influencing, official action).

Nor is there merit to the suggestion that there is a difference, for purposes of Section 1001, between false statements made in response to government inquiries and those made in communications initiated by the speaker, or between false denials and false assertions. See, *e.g.*, Pet. Br. 9-10; *Cogdell*, 844 F.2d at 184; *Paternostro*, 311 F.2d at 305 (refusing to apply Section 1001 where defendant "did not aggressively and deliberately initiate any positive or affirmative statement"). Nothing in the language of the statute suggests or supports such distinctions; and there is no basis for the categorical conclusion that false denials in response to an investigator's questions pose any less serious risk of interference with the proper functioning of government than do a variety of other false statements, such as misleading affirmative responses, or false declarations made in applications for benefits or on forms designed to implement disclosure requirements. See, *e.g.*, *Bedore*, *supra* (precluding prosecution of defendant who gave false name to federal agent attempting to serve subpoena); see also *Poutre*, 646 F.2d at 686 (describing the affirmative/negative distinction as "arbitrar[y]"); compare *Woodward*, *supra* (false "no" on currency disclosure form used at border); *United States* v. *Knox*, 396 U.S. 77,

82-83 (1969) (discussing similar attempt to distinguish "voluntarily filed" statement from one filed under legal compulsion). In *United States* v. *Rodgers*, 466 U.S. 475 (1984), this Court held that a federal criminal investigation is a "matter within the jurisdiction of any department or agency of the United States" within the meaning of Section 1001. If anything, a false response to a question posed during the course of a preexisting investigation is even more clearly made "in" the relevant governmental "matter" than was the statement at issue in *Rodgers*, which led federal officers to initiate the criminal investigation that this Court held was "surely" a "matter" within the scope of the statute (466 U.S. at 479).

Petitioner's amicus argues that recognition of the "exculpatory no" exception would actually "promote accurate information sharing with the government." NACDL Br. 19. It is entirely speculative, and somewhat counterintuitive, to contend that there exist sophisticated informants who would speak with government agents if, but only if, they are at liberty to make false exculpatory denials (limited to the word "no," see *id.* at 4-5) without fear of prosecution; if they exist, it is doubtful that the benefits of catering to them would outweigh the costs of weakening the principle that statements made to federal authorities must be truthful. In any event, if there is such a balance to be struck, it is up to investigative authorities themselves to strike it. See *United States* v. *Lambert*, 501 F.2d 943, 946 (5th Cir. 1974) (en banc) ("[T]he potential for overzealous application of § 1001 * * * poses a limited threat because investigators, to whom access to information is critically important, would not want to gain a reputation for routinely

seeking to prosecute complainants and informants who give false information.").

Finally, petitioner (Br. 18-20) and his amicus (Br. 21-23) suggest that an "exculpatory no" exception to Section 1001 is desirable to prevent investigative or prosecutorial "overreaching" (NACDL Br. 21). Like any broad criminal prohibition that is applicable in a wide variety of circumstances, Section 1001 gives rise to opportunities for the exercise of enforcement discretion. That discretion is traditionally and properly exercised, however, by administrative and prosecutorial authorities within the Executive Branch, not by the "judicial engrafting of an * * * exception on a facially all-inclusive statute." *Poutre*, 646 F.2d at 686. Policy considerations such as those petitioner suggests (Br. 8-10, 19-20), or those reflected in the Ninth Circuit's five-factor "exculpatory no" test (see *Equihua-Juarez*, 851 F.2d at 1224), might or might not supply useful general guides for the exercise of prosecutorial discretion.[11] But like the

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[11] As we noted in our brief at the petition stage (at 8-9 & n.4), the Department of Justice has advised its prosecutors that in general "it is not appropriate to charge a Section 1001 violation where a suspect, during an investigation, merely denies his guilt in response to questioning by the government." United States Attorney's Manual § 9-42.160 (adopted Feb. 12, 1996) (reprinted in the appendix to our brief at the petition stage, at 3a-4a). That statement is a guideline for use by the Department's attorneys in exercising prosecutorial discretion; it does not represent the Department's construction of Section 1001, nor does it create judicially enforceable rights. See United States Attorney's Manual § 1-1.100 (1988); *United States* v. *Piervinanzi*, 23 F.3d 670, 682-683 (2d Cir.), cert. denied, 513 U.S. 900, 904 (1994); *United States* v. *Craveiro*, 907 F.2d 260, 264 (1st Cir.), cert. denied, 498 U.S. 1015 (1990). The policies underlying the "exculpatory no" cases have also

analogous arguments made and rejected in *Rodgers*, 466 U.S. at 482-484, and in *United States* v. *Yermian*, 468 U.S. 63, 74-75 (1984) (defendant need not have "actual knowledge" of federal agency jurisdiction over matter in which false statement is made), those policy concerns are "not sufficient to overcome the express statutory language of § 1001." *Id.* at 74; see also *Hubbard* v. *United States*, 514 U.S. 695, 702 (1995) (overruling *United States* v. *Bramblett*, 348 U.S. 503 (1955), which "erred by giving insufficient weight to the plain language" of Section 1001); *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941) (1934 amendments to what is now Section 1001 were intended to broaden the statute, and "[w]e see no reason why this apparent intention should be frustrated by construction").

As in *Yermian*, petitioner's policy arguments involve no contention that Congress "lacks the power to impose criminal sanctions for deliberately false statements submitted to a federal agency"; and that is "precisely what Congress has done here." 468 U.S. at 74-75. Beyond the question of constitutional power, any effort to carve out an "exculpatory no" exception from Section 1001 "amount[s] to little more than a preference for a narrower over [a] broader statute." Pet. App. 10. As this Court has already made clear, however, "[r]esolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress," not the courts. *Rodgers*, 466 U.S. at 484.

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formed the basis of legislative proposals—none of which has been enacted. See *Rodriguez-Rios*, 14 F.3d at 1048 n.19 (noting Congress's failure to enact certain proposed limitations); *Poutre*, 646 F.2d at 686 & n.2 (describing proposals then pending).

D. Nothing In The Legislative History Of Section 1001 Warrants Judicial Creation Of An "Exculpatory No" Exception

Because the language of Section 1001 is clear, there is no need to examine the history of the statute to resolve this case. This Court has previously reviewed that history in considerable detail, however, most recently in *Hubbard* v. *United States*, 514 U.S. at 703-708. See also *Yermian*, 468 U.S. at 70-74; *Bramblett*, 348 U.S. at 504-508; *Gilliland*, 312 U.S. at 91-96. To the extent that it is relevant here, the evolution of the statute demonstrates that when Congress has intended to restrict the prohibition now contained in Section 1001 to certain types of falsehoods, it has stated the limitations expressly.

The "earliest statutory progenitor" of the present provision prohibited false statements only if made "for the purpose of obtaining, or aiding in obtaining, the approval or payment of [a false] claim." *Hubbard*, 514 U.S. at 704-705 (quoting Act of Mar. 2, 1863, ch. 67, § 1, 12 Stat. 696). A 1918 amendment added a proscription against false statements made "for the purpose and with the intent of cheating and swindling or defrauding the Government." 514 U.S. at 705-706 (quoting Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015). In 1934, however, Congress broadened the statute by eliminating any restriction to cases involving pecuniary or property loss to the government. *Gilliland*, 312 U.S. at 92-93 (citing Act of June 18, 1934, ch. 587, 48 Stat. 996). The provision was reorganized and reenacted without pertinent change in 1948, when it was first codified at 18 U.S.C. 1001.

For present purposes, the salient point is that nothing in this history suggests any congressional

intention to exclude from the scope of the present Section 1001 any kind of material false statement made to federal criminal investigators. If it had intended any such limitation, Congress was capable of enacting it explicitly. As in *Yermian*, the fact that it did not do so "provides convincing evidence that the statute does not require" proof of any element beyond those stated in its text. 468 U.S. at 73; see also *Gilliland*, 312 U.S. at 93; *Rodriguez-Rios*, 14 F.3d at 1048 ("[W]hen Congress wished to restrict the scope of § 1001 to statements made for certain purposes, it did so explicitly.").

Petitioner and his amicus point to no evidence in the drafting or evolution of the language of Section 1001 itself to support their position. Petitioner contends instead (Br. 20-29) that Congress has ratified or acquiesced in the judicial gloss on Section 1001 by failing to amend the statute to repudiate the "exculpatory no" doctrine, by reenacting that Section in 1996, and by failing to countermand commentary to the United States Sentencing Guidelines concerning the obstruction-of-justice sentencing enhancement governed by Guidelines § 3C1.1. See NACDL Br. 11-18 (arguing ratification). Those arguments are without merit.

This Court has "frequently cautioned that it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *United States* v. *Wells*, 117 S. Ct. 921, 929 (1997) (internal quotation marks and brackets omitted); see also, *e.g.*, *Brown* v. *Gardner*, 513 U.S. 115, 121-122 (1994); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186-187 (1994). Similarly, "failed legislative proposals" of the type petitioner cites (Br. 23-24) "are 'a

particularly dangerous ground on which to rest an interpretation of a prior statute' "; the failure to adopt them "lacks persuasive significance because several equally tenable inferences may be drawn from such inaction." *Central Bank*, 511 U.S. at 187. Moreover, whatever weight congressional inaction might, under some circumstances, lend to one alternative interpretation of an ambiguous statute, it can lend none to a judicial gloss, like the "exculpatory no" doctrine, that varies or contradicts the plain language of the statute itself. "The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible." *Brown*, 513 U.S. at 121-122 (quoting *Zuber* v. *Allen*, 396 U.S. 168, 185 n.21 (1969)).

Although congressional reenactment of a statute that has been given a "consistent judicial construction" can, under appropriate circumstances, provide a useful guide to interpretation, see *Central Bank*, 511 U.S. at 185; *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978), that principle has no application in this case. To begin with, the varied articulations and applications of the "exculpatory no" doctrine in the courts of appeals described above (see pages 12-20, *supra*) "hardly [reflect] the sort of uniform construction that Congress might have endorsed." *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 532 (1994) (discussing Copyright Act of 1909). Moreover, by the time of the 1996 revision and reenactment of Section 1001 cited by petitioner (Br. 23-25), the first court of appeals to adopt the "exculpatory no" doctrine had reconsidered the matter en banc and repudiated it. *Rodriguez-Rios*, *supra*. The courts of appeals were therefore divided not only as to the contours of the doctrine, but as to whether it should be recognized at all. "It would

thus be impossible to say which view Congress might have endorsed." *Wells*, 117 S. Ct. at 930; see *Fogerty*, 510 U.S. at 531-532.

Petitioner and his amicus cite no evidence that Congress specifically considered the "exculpatory no" doctrine when it revised Section 1001 in 1996, and we are aware of none. See *Brown*, 513 U.S. at 121 (where there is no evidence that Congress was aware of a regulatory interpretation, "we consider the . . . re-enactment to be without significance"); *Zuber*, 396 U.S. at 185 n.21. There is even less reason to infer congressional approval of the "exculpatory no" exception to Section 1001—effectively amending a federal criminal statute—from Congress's failure to countermand or amend an "application note" drafted by the United States Sentencing Commission to accompany its Guideline for the imposition of an obstruction-of-justice enhancement in federal criminal sentences.[12] See Pet. Br. 26-29. Moreover, as with acquiescence, while reenactment may aid in the resolution of ambiguity, it cannot vary the terms of a clear statute. "[W]here the law is plain, subsequent reenactment does not constitute an adoption of a previous * * * construction." *Brown*, 513 U.S. at 121 (quoting *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991)). As this Court specifically cautioned in *Hubbard*, 514 U.S. at 708, "[c]ourts should not rely on inconclusive statutory history as a basis for refusing

[12] The application note in any event does not adopt an "exculpatory no" safe harbor for false denials of criminal liability, but simply requires a showing of actual obstruction of justice to support a sentence enhancement for unsworn false statements. See Guidelines § 3C1.1 & Application Note 3(g).

to give effect to the plain language of an Act of Congress."

E. The Fifth Amendment Does Not Require Or Justify The Creation Of A Judicial Exception To Section 1001

Finally, petitioner argues (Br. 11-17) that applying Section 1001 to a false denial of guilt made to federal investigators would violate "the spirit of the Fifth Amendment" (Br. 17), because the potential for such liability would leave a "cornered suspect" on the horns of a "cruel trilemma," facing a choice among self-incrimination, violation of Section 1001, or the invocation of a right to remain silent that petitioner characterizes as "illusory" (Br. 11-12). See, *e.g.*, *Cogdell*, 844 F.2d at 182-183; *United States* v. *Payne*, 750 F.2d 844, 861-866 (11th Cir. 1985). The difficult choice that may face a suspect "cornered" by federal investigators arises, however, from any potential that the truth has to incriminate the suspect, and from inherent limits on the protection provided by the Fifth Amendment privilege against compelled self-incrimination. That quandary provides no basis for imposing non-textual limitations on Congress's broad criminal prohibition against lying to government agents.

A suspect questioned by a government agent has three choices. There is the option of telling the truth—a course that may have significant benefits, not only for the government and the public, but for the suspect himself.[13] There is also, de facto, the

[13] The record suggests (J.A. 1-2) that federal agents approached petitioner at least in part to seek his cooperation in an ongoing investigation. Of course, potential defendants who

option of lying to the investigator, perhaps in the hope that suspicion will be deflected; that delay may provide opportunities to warn co-conspirators, to conceal or destroy evidence, or to escape arrest; or that authorities will fail to discover sufficient other evidence to permit successful prosecution. The government has an obvious and substantial interest in discouraging the use of that option by imposing additional criminal sanctions on those, like petitioner, who can be proved to have selected it.

The suspect's third option is to remain silent. See *Rodriguez-Rios*, 14 F.3d at 1050; *Steele*, 933 F.2d at 1321. Petitioner terms that option "illusory" (Br. 12) because a suspect may not be aware of it, or may fear that silence will be used against him—that is, that refusal to answer a question may suggest that there is a reason for the refusal. Because, petitioner argues, the suspect has no "viable option" (Br. 15) to remain silent, he must be protected from prosecution for a false denial of guilt, in order to protect his Fifth Amendment right not to be forced to incriminate himself (Br. 16-17). That argument is unsound.

This Court has repeatedly rejected the proposition that the Fifth Amendment ever confers a privilege to lie, rather than simply to remain silent. There is no "privilege to answer fraudulently a question that the Government should not have asked"; rather, "[a] citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly

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agree to cooperate and who provide information that assists the government in fully uncovering and extirpating criminal activity are often treated more leniently, with respect to both charging and sentencing, than others who refuse to cooperate or to admit their criminal responsibility.

and willfully answer with a falsehood." *Bryson* v. *United States*, 396 U.S. 64, 72 (1969); see also *United States* v. *Wong*, 431 U.S. 174, 178 (1977) ("[E]ven the predicament of being forced to choose between incriminatory truth and falsehood, as opposed to refusing to answer, does not justify perjury.").[14]

Even if a suspect's silence may later be used against him, there is no support for the recognition of a constitutional right to lie. In *United States* v. *Knox*, 396 U.S. 77 (1969), a taxpayer argued that he was forced to provide false information on a return because the truth would have incriminated him and silence (*i.e.*, failure to file any return) would itself have been a crime. In rejecting the taxpayer's constitutional challenge to a prosecution under Section 1001, this Court simply noted that in selecting a third alternative—the filing of false information—he pursued "a course that the Fifth Amendment gave him no privilege to take." 396 U.S. at 82. Petitioner's claim is even weaker than Knox's, because under no circumstances could petitioner's mere silence have made

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[14] See also *United States* v. *Dunnigan*, 507 U.S. 87, 96 (1993) ("[A] defendant's right to testify does not include a right to commit perjury."); *United States* v. *Apfelbaum*, 445 U.S. 115, 117 (1980) ("invocation of the Fifth Amendment privilege * * * allows a witness to remain silent, but not to swear falsely"); *United States* v. *Mandujano*, 425 U.S. 564, 584 (1976) (plurality opinion) (witness "was free at every stage to interpose his constitutional privilege against self-incrimination, but perjury was not a permissible option"); *Knox*, 396 U.S. at 81-82 (no Fifth Amendment privilege to file false tax return); *Glickstein* v. *United States*, 222 U.S. 139, 142 (1911); cf. *Harris* v. *New York*, 401 U.S. 222, 225 (1971) (otherwise excludable statement could be used to impeach testifying defendant, because "[h]aving voluntarily taken the stand, petitioner was under an obligation to speak truthfully").

him subject to criminal prosecution. Cf. *Wong*, 431 U.S. at 179.[15]

Nor is the option of remaining silent "illusory" because agents may pay a surprise visit to a suspect's home and begin accusatory questioning without warning the suspect of his rights. Pet. Br. 12. Non-custodial questioning has never been thought to impose pressures that are tantamount to custodial interrogation, and no warning is required when officials conduct a voluntary, consensual interview. *E.g.*, *Beckwith* v. *United States*, 425 U.S. 341, 344-347 (1976); see also *Stansbury* v. *California*, 511 U.S. 318, 323 (1994) (per curiam). Nor does a suspect who is not in custody acquire any right to lie on the theory that the absence of warnings renders him incapable of exercising the right to remain silent. In *United States* v. *Wong*, this Court rejected the claim of a grand jury witness that her perjury was justified by the Fifth Amendment because, without adequate warning of her right to remain silent, her only choices were self-incrimination and lying: "[T]he Fifth Amendment * * * grants a privilege to remain silent without risking contempt, but it does not endow

[15] Such silence might or might not be admissible as substantive evidence of guilt in an ensuing criminal prosecution. See *United States* v. *Thompson*, 82 F.3d 849, 855 (9th Cir. 1996) (discussing disagreement in cases addressing that issue). The resolution of that issue, however, has no bearing on whether the Fifth Amendment protects lying as an option. Possible evidentiary consequences of silence may always exert pressure on a suspect to talk. Cf. *Jenkins* v. *Anderson*, 447 U.S. 231, 235-238 (1980) (pre-arrest silence may be used to impeach a defendant who waives Fifth Amendment privilege by testifying at trial). It has never been suggested, however, that that form of pressure would justify a right to make false exculpatory denials.

the person who testifies with a license to commit perjury. The failure to provide a warning of the privilege * * * does not call for a different result." 431 U.S. at 178 (citation omitted).

In sum, whatever shelter the Fifth Amendment gives to silence, it does not protect an individual who chooses to speak, but speaks falsely. Section 1001 punishes only "intentional and deliberate lies." *Yermian*, 468 U.S. at 74. In so doing, it infringes no right protected by the Constitution.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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